



NORTH CAROLINA LAW REVIEW

Volume 15 | Number 1

Article 16

12-1-1936

Criminal Law -- Solicitation

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Recommended Citation

S. J. Stern Jr., *Criminal Law -- Solicitation*, 15 N.C. L. REV. 56 (1936).

Available at: <http://scholarship.law.unc.edu/nclr/vol15/iss1/16>

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under the first indictment upon the facts alleged in the second, but he could be convicted of the lesser crime upon the first indictment as the greater crime includes the smaller.¹⁷ If the acts alleged in the second indictment are used against the defendant in the first, it is manifest that there is double jeopardy.¹⁸

Where there are two transactions and two separate crimes arise,¹⁹ or where there is a repetition of the same crime,²⁰ a prosecution for one offense is clearly no bar to the other. If there is only one transaction and separate and distinct statutes are violated, the same result is reached.²¹

Where there is a failure to perform a legal duty, that omission of duty cannot be divided into separate offenses, because one prosecution will be a bar to subsequent proceedings.²²

The principal case is consistent with those cases holding that crimes arising out of one transaction and invading the rights of two persons are separate and distinct offenses. Plainly, the defendant is not being put in double jeopardy when prosecuted separately for the offense against each victim. Just as the victims are different, the offenses are different.

C. C. BENNETT.

Criminal Law—Solicitation.

The defendant told a fifteen-year-old boy that if he would set fire to a certain dwelling he would reward him with a pistol and furnish him with the necessary matches and oil. The boy assented to the plan but upon leaving the defendant, disclosed it to the officers. The North

rape. It is believed this statute would alter the result reached in this case, making it consistent with the other cases).

¹⁷ N. C. CODE ANN. (Michie, 1935) §§4639, 4640.

¹⁸ *State v. Lindsay*, 61 N. C. 468 (1867); *State v. Lawson and Cheatham*, 123 N. C. 740, 31 S. E. 667 (1898); *State v. Freeman*, 162 N. C. 594, 77 S. E. 780, (1913); *Cf. State v. Hankins*, 136 N. C. 621, 48 S. E. 593 (1904).

¹⁹ *State v. Robinson*, 116 N. C. 1047, 21 S. E. 701 (1895) (concealed weapon-assault and battery); *State v. Hooker*, 145 N. C. 581, 59 S. E. 866 (1907) (stealing-breaking and entering); *State v. Mansfield*, 207 N. C. 233, 176 S. E. 761 (1934) (bastardy-abandonment).

²⁰ *State v. Williams*, 94 N. C. 891 (1886) (selling liquor to different persons); *State v. White*, 146 N. C. 608, 60 S. E. 505 (1908) (carrying concealed weapon on different occasions); *State v. Jones*, 201 N. C. 424, 160 S. E. 468 (1931) (abandonment of children).

²¹ *State v. Pierce*, 208 N. C. 47, 179 S. E. 8 (1935) (burning barn-burning personal property in barn).

²² *State v. Roberson*, 136 N. C. 591, 48 S. E. 596 (1904) (prosecution for failure to get an annual license bars a further prosecution within the year); *State v. Commissioners of Fayetteville*, 6 N. C. 371 (1818) (prosecution for failure to keep one street in repair bars a further prosecution as to other streets in disrepair at the same time); *cf. State v. Jones*, 201 N. C. 424, 160 S. E. 468 (1931) (failure to support children is continuing offense and prosecution therefore is not barred by conviction for prior time).

Carolina Supreme Court *held* the defendant guilty of the common-law offense of soliciting the commission of a felony.¹

This is a case of first impression in North Carolina, though the solicitation of another to commit a felony was ruled a common-law offense in *Rex v. Higgins*² in 1801. The holding of the principal case is in line with the overwhelming weight of authority.³

The offense of solicitation, a misdemeanor,⁴ is complete when the solicitor has attempted to persuade another to commit a crime. Whether or not the person solicited consents, or having consented, makes an effort to commit the crime is of no moment.⁵ The act of soliciting is punishable as it, in and of itself, is sufficient to take the case out of the sphere of mere intent.

A few states have made solicitation an offense by statutory enactment.⁶ In the absence of statutes it has been held indictable as a common-law offense to solicit any person to commit larceny,⁷ murder,⁸ arson,⁹ sodomy,¹⁰ assault and battery,¹¹ and adultery.¹²

¹ State v. Tony Hampton, 210 N. C. 283, 186 S. E. 251 (1936).

² 2 East. 5. The defendant solicited a servant to steal his master's goods. *Held*: defendant guilty of a misdemeanor, although the indictment did not charge that the servant stole the goods, nor that any other act was done other than the soliciting.

³ United States v. Galleanni, 245 Fed. 977 (D. C. D. Mass. 1917); State v. Schleifer, 99 Conn. 432, 121 Atl. 805 (1923); State v. Donovan, 28 Del. 40, 90 Atl. 220 (1914); Commonwealth v. Flagg, 135 Mass. 545 (1883); People v. Hammond, 132 Mich. 422, 93 N. W. 1084 (1903); State v. Sullivan, 110 Mo. App. 75, 84 S. W. 105 (1904); Commonwealth v. Randolph, 146 Pa. 83, 23 Atl. 388 (1892); State v. Bowers, 35 S. C. 262, 14 S. E. 488 (1892); Wiseman v. Commonwealth, 143 Va. 631, 130 S. E. 249 (1925); Rudolph v. State, 128 Wis. 222, 107 N. W. 466 (1906); see State v. Hudon, 103 Vt. 17, 20, 151 Atl. 562, 564 (1930); Blackburn, *Solicitation to Crime* (1934) 40 W. VA. L. REV. 135. But see Cox v. People, 82 Ill. 191, 192, 193 (1876); 1 BISHOP, CRIMINAL LAW (9th ed. 1923) §768, c. 2; 1 McCLAIN, CRIMINAL LAW (1897) §220.

⁴ State v. Avery, 7 Conn. 266 (1828); State v. Sullivan, 110 Mo. App. 75, 84 S. W. 105 (1904); Commonwealth v. Hutchinson, 6 Pa. Super. 405 (1897).

⁵ United States v. Galleanni, 245 Fed. 977 (D. C. D. Mass. 1917); State v. Donovan, 28 Del. 40, 90 Atl. 220 (1914); Commonwealth v. Flagg, 135 Mass. 545 (1883); People v. Hammond, 132 Mich. 422, 93 N. W. 1084 (1903); State v. Bowers, 35 S. C. 262, 14 S. E. 488 (1892); see State v. Hudon, 103 Vt. 17, 20, 151 Atl. 562, 564 (1930).

⁶ CAL. PENAL CODE (Deering, 1935) §653f (solicitation of certain felonies); CONN. GEN. STAT. (1930) §6072 (solicitation of injury to person or property); IOWA CODE (1935) §12917 (solicitation of murder); VT. PUB. LAWS (1933) c. 349, §8746 (solicitation of felonies).

⁷ State v. Schleifer, 99 Conn. 432, 121 Atl. 805 (1923).

⁸ Commonwealth v. Randolph, 146 Pa. 83, 23 Atl. 388 (1892); see State v. Lourie, 12 S. W. (2d) 43, 45 (Mo. 1928).

⁹ State v. Donovan, 28 Del. 40, 90 Atl. 220 (1914); Commonwealth v. Flagg, 135 Mass. 545 (1883); Commonwealth v. Hutchinson, 6 Pa. Super. 405 (1897); State v. Bowers, 35 S. C. 262, 14 S. E. 488 (1892).

¹⁰ See State v. George, 79 Wash. 262, 140 Pac. 337, 339 (1914).

¹¹ United States v. Lyman, Fed. Cas. No. 15646 (C. C. D. Mass. 1818).

¹² State v. Avery, 7 Conn. 266 (1828). *Contra*: Smith v. Commonwealth, 54 Pa. 209 (1867) (adultery in Pa. was a misdemeanor, not a felony).

Though the crime is apparently clear and definite there has been much confusion in its application. Not infrequently it has been confused with an attempt to commit a crime.¹³ The soliciting of another is not a sufficient act—"a step in the direction of the crime"—to constitute an attempt, and as against one who is merely guilty of solicitation an indictment for an attempt will not lie.¹⁴ Further, solicitation may be distinguished from an attempt as it is the act of a person who solicits another to commit a crime; while an attempt is the act of one who himself intends to commit the crime. Both are substantive offenses and should be treated as separate and distinct.

Though the courts have almost unanimously held the solicitation of a felony to be an offense, the courts differ when the solicitation is of a misdemeanor. One line of authority rules that there can be no offense of solicitation of a misdemeanor,¹⁵ while another rules it a crime if the misdemeanor is of a "high or aggravated type".¹⁶ The latter view seems the better, as the distinction between felonies and misdemeanors is usually arbitrary, being governed by no fixed or definite principles, as there is apparently no intrinsic difference between the two.¹⁷ Also, often, certain misdemeanors are more detrimental to the interests of society than many of the felonies. The solicited crime in the principal case being that of arson, the North Carolina court was not called upon to rule on the misdemeanor problem.

It is to be hoped that in the future the North Carolina doctrine of solicitation will be extended to include "high or aggravated misdemeanors".

S. J. STERN, JR.

¹³ See *State v. Schleifer*, 99 Conn. 432, 438, 439, 440, 121 Atl. 805, 806, 807 (1923); *State v. Lavine*, 96 N. J. 356, 358, 115 Atl. 335, 336 (1921); *State v. Bowers*, 35 S. C. 262, 264, 14 S. E. 488, 489 (1892); *State v. George*, 79 Wash. 262, 140 Pac. 337, 338 (1914); *State v. Baller*, 26 W. Va. 90, 92 (1885).

¹⁴ *State v. Donovan*, 28 Del. 40, 90 Atl. 220 (1914); *State v. Bowles*, 70 Kan. 821, 79 Pac. 726 (1905); *McDade v. People*, 29 Mich. 50 (1874); *State v. Lampe*, 131 Minn. 65, 154 N. W. 737 (1915); *State v. Davis*, 319 Mo. 1222, 6 S. W. (2d) 609 (1928); *Stabler v. Commonwealth*, 95 Pa. 318 (1880); *Hicks v. Commonwealth*, 86 Va. 223, 9 S. E. 1024 (1889); *State v. Butler*, 8 Wash. 194, 35 Pac. 1093 (1894); *State v. Baller*, 26 W. Va. 90 (1885); CLARK AND MARSHALL, CRIMES (3d ed. 1927) §133. *Contra*: *State v. Taylor*, 47 Ore. 455, 84 Pac. 82 (1906); BISHOP, NEW CRIMINAL PROCEDURE (2d ed. 1913) §74.

¹⁵ *Smith v. Commonwealth*, 54 Pa. 209 (1867); CLARK AND MARSHALL, CRIMES (3d ed. 1927) §132.

¹⁶ *State v. Schleifer*, 99 Conn. 432, 121 Atl. 805 (1923); *Cox v. People*, 82 Ill. 191 (1876); *Commonwealth v. Hutchinson*, 6 Pa. Super. 405 (1897); *State v. Keyes*, 8 Vt. 57 (1836); see *United States v. Galleanni*, 245 Fed. 977, 978 (D. C. D. Mass. 1917); *Commonwealth v. Flagg*, 135 Mass. 545, 549 (1883); *State v. Butler*, 8 Wash. 194, 35 Pac. 1093, 1094 (1894).

¹⁷ "The statutory classification of crime, as felony or misdemeanor, is governed by no fixed or definite principle, but is purely arbitrary. Legislative whim or caprice may alone determine in which category an offense, not a felony at common law, shall be placed." *Commonwealth v. Hutchinson*, 6 Pa. Super. 405, 409 (1898).